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7 JOHNATHAN PAK, M.D.,  
8 Plaintiff,  
9 v.  
10 GUARDIAN LIFE INSURANCE  
11 COMPANY OF AMERICA,  
12 Defendant.

Case No. [21-cv-05032-WHO](#)

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28 **ORDER GRANTING IN PART AND  
DENYING IN PART MOTION FOR  
SUMMARY JUDGMENT**

Re: Dkt. No. 54

Defendant Guardian Life Insurance Company of America (“Guardian”) moves for summary judgment of two claims brought by defendant Johnathan Pak, who alleges that Guardian breached their insurance contract and the covenant of good faith and fair dealing when it denied Pak total disability benefits, awarding residual benefits instead. Pak, who now concedes that his occupation at the time of his disability was both general and pediatric anesthesiology, has proffered sufficient evidence showing a genuine dispute of material fact over whether he was able to perform the substantial and material duties of his occupation in the usual and customary manner with relative continuity. Guardian’s motion is therefore with respect to the breach of contract claim. But it is GRANTED on the breach of good faith claim and on Pak’s request for punitive damages. There is a genuine dispute over whether Pak was totally disabled, as shown by the evidence submitted on the breach of contract claim. Pak attempts to create a genuine dispute of material fact where none exists; the record shows that Guardian considered the evidence that he claims was ignored and portrayed it accurately. And any delay in the determination of Pak’s claim was reasonable given the nature of the (still ongoing) dispute. As the only remaining claim is for breach of contract, Pak has no claim for punitive damages.

## BACKGROUND

Between 2003 and 2008, Pak, an anesthesiologist, purchased four disability insurance policies (“the policies”) from Guardian. Mot. for Summ. J. (“MSJ”) [Dkt. No. 54] 2:18-20 (citing Kelly Decl. ¶ 4); Oppo. [Dkt. No. 55] 1:22-25 (citing Pak Decl. ¶ 2). The policies provide for benefit payments of approximately \$15,000 per month if Pak became “totally disabled,” and other benefits if he became “residually disabled.” *See* MSJ at 2:22-25; Oppo. at 1:25-2:10. The policies define those terms as follows:

### Total Disability

Until we have paid benefits for five years in the same claim, total disability means that, because of sickness or injury, you are not able to perform the major duties of your occupation.

After that in the same claim, total disability means that, because of sickness or injury, you are not able to perform the major duties of your occupation and you are not at work in any occupation.

Your occupation means the regular occupation (or occupations, if more than one) in which you are engaged at the time you become disabled.

If your occupation is limited to a single medical specialty certified by the American Board of Medical Specialties . . . we will deem your specialty to be your occupation.

...

**Residual disability** means that you are at work and are not totally disabled under the terms of this policy but, because of sickness or injury your loss of income is at least 20% of your prior income.

*See, e.g.*, MSJ, Kelly Decl., Ex. 1 at 2533, 2539; Oppo., Pak Decl., Ex. A at 9, 14.

In August 2018, Pak began experiencing severe migraine headaches that caused him significant pain, blurred vision, and dizziness, disrupted his sleep, and left him sensitive to light and sound, among other symptoms. MSJ at 1:3-5; Oppo. at 3:23-26 (citing Pak Decl. ¶ 9). On July 23, 2019, he filed a disability claim with Guardian stating that he had worked in a reduced capacity because of “chronic migraine headaches with severe blurriness, vision disturbances, nausea, light and sound sensitivity [and] major sleep deprivation.” *See* Oppo., Pak Decl., Ex. C at 4-5. He stated his occupation as “pediatric and general anesthesiologist,” listing his occupational

1 duties as “pediatric anesthesia, general anesthesia, patient care, pediatric care consults [and]  
2 overnight on-call.” *Id.* at 7-8. He also submitted a statement from his neurologist, Dr. Noor  
3 Sachdev, who confirmed that Pak had been diagnosed with chronic migraines and recommended  
4 that he reduce his work activities but not that he stop working altogether. *Id.* at 11-12.

5 Guardian investigated Pak’s claim over the next several months, requesting information  
6 such as billing records, financial information, and a list of procedures that Pak was no longer  
7 performing. MSJ at 4:9-13 (citing Kelly Decl., Ex. 4). Pak also submitted progress reports  
8 updating Guardian on his condition and ability to work. *See, e.g., id.*, Kelly Decl., Ex. 6. On  
9 December 4, 2019, Pak informed Guardian that he had relinquished his pediatric anesthesiology  
10 responsibilities but continued to work as a general anesthesiologist “while minimizing [his] calls.”  
11 *Id.* He later submitted letters from current and former employers stating he was no longer  
12 practicing pediatric anesthesiology. *Id.*, Ex. 7. In February 2020, Pak told Guardian he was “no  
13 longer performing pediatric cases under the age of 12.” *Id.*, Ex. 8.

14 On February 25, 2020, Guardian issued Pak a \$41,575.16 check. *Id.*, Ex. 9. In a letter sent  
15 to Pak’s attorney on March 5, 2020, Guardian explained that this was a residual disability payment  
16 but that its investigation into Pak’s eligibility for total disability benefits was ongoing. *Id.*

17 On July 2, 2020—after a back-and-forth between the parties over the nature of Pak’s pre-  
18 and post-disability work—Guardian denied Pak’s total disability claim. *See id.*, Ex. 16. In its  
19 letter to Pak, Guardian stated that its analysis of the work he performed (captured by “ASA/CPT  
20 codes”), medical records, progress reports, and financial information showed that he was not  
21 eligible for total disability benefits. *Id.* Guardian also stated that: (1) it disagreed with Pak that  
22 his pre-disability occupation was limited to pediatric anesthesiology; and (2) the evidence did not  
23 support that his condition only restricted or limited his ability to work on pediatric patients while  
24 still allowing for the safe performance of general anesthesiology. *See id.*

25 On October 15, 2020, Pak sued Guardian in the California Superior Court for the City and  
26 County of San Francisco for breaches of contract and the covenant of good faith and fair dealing,  
27 arising out of its denial of his total disability claim. Dkt. No. 1. Guardian removed the case to this  
28 court in June 2021. *Id.* It filed this motion for summary judgment on June 15, 2022, which I

1 heard on July 20. Dkt. No. 54.

## 2 **LEGAL STANDARD**

3 Summary judgment on a claim or defense is appropriate “if the movant shows that there is  
4 no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of  
5 law.” Fed. R. Civ. P. 56(a). In order to prevail, a party moving for summary judgment must show  
6 the absence of a genuine issue of material fact with respect to an essential element of the non-  
7 moving party’s claim, or to a defense on which the non-moving party will bear the burden of  
8 persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has  
9 made this showing, the burden then shifts to the party opposing summary judgment to identify  
10 “specific facts showing there is a genuine issue for trial.” *Id.* at 324. The party opposing  
11 summary judgment must then present affirmative evidence from which a jury could return a  
12 verdict in that party’s favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986).

13 On summary judgment, the court draws all reasonable factual inferences in favor of the  
14 non-movant. *Id.* at 255. In deciding a motion for summary judgment, “[c]redibility  
15 determinations, the weighing of the evidence, and the drawing of legitimate inferences from the  
16 facts are jury functions, not those of a judge.” *Id.* However, conclusory and speculative testimony  
17 does not raise genuine issues of fact and is insufficient to defeat summary judgment. *See*  
18 *Thornhill Publ’g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

## 19 **DISCUSSION**

### 20 **I. BREACH OF CONTRACT**

21 Pak’s breach of contract claim turns on whether he was totally disabled, as he asserts, or  
22 residually disabled, as Guardian determined. Under California law, an insured is totally disabled  
23 if he is unable to perform the substantial and material duties of his own occupation in the usual  
24 and customary way with reasonable continuity. *See Hangarter v. Provident Life & Accident Ins.*  
25 *Co.*, 373 F.3d 998, 1006 (9th Cir. 2004) (upholding jury instruction based on *Erreca v. W. States*  
26 *Life Ins. Co.*, 19 Cal. 2d 388 (1942)). “Recovery is not precluded under a total disability provision  
27 because the insured is able to perform sporadic tasks, or give attention to simple or  
28 inconsequential details incident to the conduct of business.” *Erreca*, 19 Cal. 2d at 396.

1 “Conversely, the insured is not totally disabled if he is physically and mentally capable of  
2 performing a substantial portion of the work connected with his employment.” *Id.* An insured  
3 claiming benefits has the burden of proving that he is entitled to coverage under the policy.  
4 *Argenal v. Reassure Am. Life Ins. Co.*, No. 13-01947-CRB, 2014 WL 1678008, at \*5 (N.D. Cal.  
5 Apr. 28, 2014) (citations omitted).

6 **A. Pak’s Pre-Disability Occupation**

7 In order to determine the substantial and material duties of Pak’s occupation, I must first  
8 determine what his pre-disability occupation was. This “turns on his work at the time of his  
9 disability.” *See Order Denying Mot. for Partial Summ. J.* (“First MSJ Order”) [Dkt. No. 41] 7:7-  
10 9; *see also Gross v. UnumProvident Life Ins. Co.*, 319 F. Supp. 2d 1129, 1143 (C.D. Cal. 2004)  
11 (“[W]hat matters is the occupation in which plaintiff was engaged at the time he became disabled,  
12 not the occupation in which he was board-certified or what occupation he might have practiced  
13 at the time he purchased the insurance policy.”).

14 Pak previously filed a motion for partial summary judgment to determine whether his pre-  
15 disability occupation, as defined by the policies, was pediatric anesthesiology. *See First MSJ*  
16 *Order* at 1:15-17. I held that per the policy language, his occupation was that of a pediatric  
17 anesthesiologist if he limited his work to that specialty at the time of his disability, but that  
18 Guardian had shown a dispute of material fact whether Pak so limited his work. *Id.* at 8:2-5.  
19 Guardian’s primary argument was that the majority of Pak’s work at the time of his disability was  
20 related to general, not pediatric, anesthesiology, meaning that he worked as a pediatric *and* general  
21 anesthesiologist at the time of his disability. *See id.* at 8:13-22.

22 Guardian raises the same argument on this motion for summary judgment: that Pak  
23 performed both general and pediatric anesthesiology, with the majority of his work focused on the  
24 former. *See MSJ* at 14:20-25. Pak responds that he “disagrees,” but that given my prior ruling  
25 that there was a genuine dispute of material fact over his pre-disability occupation, he “does not  
26 believe it is necessary or productive to repeat the arguments.” *See Oppo.* at 7 n.4. Pak further  
27 states that “[f]or purposes of this motion,” he “agrees that his regular, pre-disability occupation  
28 was both pediatric and general anesthesiology.” *Id.*

1        “The denial of a summary judgment motion is never law of the case because factual  
2 development of the case is still ongoing.” *Peralta v. Dillard*, 744 F.3d 1076, 1088 (9th Cir. 2014).  
3 This makes sense. “Denial of summary judgment may result from a factual dispute at the time,”  
4 one that “may disappear as the record develops.” *Id.*

5        Guardian again submits evidence that Pak did not limit his pre-disability work to pediatric  
6 anesthesiology, including Pak’s claim (which describes his occupation as a “pediatric and general  
7 anesthesiologist” and lists both pediatric anesthesia and general anesthesia as his occupational  
8 duties) and an analysis of ASA/CPT codes showing that approximately 93 percent of Pak’s pre-  
9 disability time and revenue derived from procedures performed on patients aged 12 and over. *See*  
10 MSJ, Kelly Decl., Ex. 2 at 7-8 (claim form), Ex. 14 (ASA/CPT codes).<sup>1</sup> In addition, it now offers  
11 an expert report stating that those codes “capture the vast majority” of the major duties that Pak  
12 previously argued were not reflected by the codes (including pediatric consults and pediatric  
13 surgery consults). *Id.*, Novak Decl., Ex. 24 at 6-7.

14        Pak does not argue that his pre-disability occupation was both pediatric and general  
15 anesthesiology, let alone offer any evidence to counter Guardian’s. Accordingly, I find that Pak’s  
16 occupation at the time of his disability was both pediatric and general anesthesiology.

17        **B. Pak’s Ability to Perform the Substantial and Material Duties of His Occupation**

18        The question is whether there is any genuine dispute of material fact over whether Pak is  
19 able to perform the substantial and material duties of a general *and* pediatric anesthesiologist, in  
20 the usual and customary way with reasonable continuity.

21        **1. General Anesthesiology**

22        Guardian first argues that Pak continues to practice general anesthesiology because he “has  
23 continued to perform the same types of procedures, maintained his production, and increased his  
24 average monthly charges” after his disability. MSJ at 16:12-16. In support, it primarily relies on  
25 an expert witness report evaluating Pak’s billing units and charges pre- and post-disability. *See id.*  
26 at 15:12-16:11 (citing Smith Decl., Ex. 25 (“Smith Report”) at 10-11). The report analyzed  
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28 <sup>1</sup> Guardian initially filed an illegible version of Exhibit 2 with its motion for summary judgment.  
See Dkt. No. 54-1. It filed an errata with a legible version, which can be found at Docket No. 58.

1 certain productivity metrics, including “base unit values” (which are “used for establishing fee  
2 schedule allowances” and “take into account the complexity, risk, and skill required to perform the  
3 service”) and “charges billed” (which “represent the physician’s fee/charge submitted to the payer  
4 for reimbursement”). Smith Report at 10. The report shows that 80 percent of Pak’s pre-disability  
5 base units were billed for anesthesia and 16 percent for surgery. *Id.* Post-disability, 83 percent of  
6 base units were billed for anesthesia, and 10 percent for surgery. *Id.* The report also shows that  
7 89 percent of Pak’s pre-disability charges billed were for anesthesia and 9 percent for surgery. *Id.*  
8 at 12. Post-disability, the percent of charges billed for anesthesia remained the same, while that  
9 for surgery dropped to 6 percent. *Id.*

10 Moreover, Guardian argues, the report shows that Pak’s “total production has remained  
11 steady as well.” MSJ at 16:1-2. Pak averaged 506.70 base units billed monthly pre-disability,  
12 which dropped to 491.78 post-disability (including a nearly 32 percent decrease in 2020, during  
13 the beginning of the COVID-19 pandemic). Smith Report at 10. And, Guardian notes, the report  
14 shows that Pak’s monthly average charges billed increased pre- to post-disability, from almost  
15 \$145,463 to nearly \$175,462. MSJ at 16:5-11 (citing Smith Report at 12).

16 Guardian concedes that another memo analyzing Pak’s pre- and post-disability ASA/CPT  
17 codes shows that he “currently performs fewer longer/complex cases and more outpatient  
18 procedures,” but contends that it also shows that he “is still performing all of the same procedures  
19 that he performed pre-disability and earning significant revenue from those procedures.” MSJ at  
20 15:20-22 (citing Kelly Decl., Ex. 17).

21 Pak responds by challenging the credibility of Guardian’s analysis and by submitting  
22 evidence that he argues shows he no longer performs the substantial and material duties of general  
23 anesthesia. *See Oppo.* at 11:23-13:28. First, he contends that the ASA/CPT codes “do not  
24 demonstrate the true volume and nature” of his work, as they do not provide data on certain duties  
25 performed (including, among others, his on-call hours) and because his former employer  
26 underreported several categories (including base units and charges billed) so the “pre-disability  
27 production data is lower than it should be.” *Id.* at 12:34-21. In support, he cites his own  
28 declaration and a letter from his attorney to Guardian including a summary of Pak’s codes

1 showing a decrease in anesthesia units. *See Oppo.*, Pak Decl. ¶¶ 21, 24; Bourhis Decl., Ex. S. Pak  
2 also argues that the codes “fail to capture the nature and complexity” of the procedures performed,  
3 which are instead gleaned from separate anesthesia records. *See id.* at 13:3-11. He points to the  
4 deposition of Henry Kamali, Pak’s current boss, who testified that in order to determine the type  
5 of procedures Pak was performing, one “would have to look at the anesthesia records” because  
6 “[y]ou can’t get all the information you need from a CPT code.” *See id.* (citing Bourhis Decl., Ex.  
7 AA (“Kamali Depo.”) at 94:21-95:22).

8 Moreover, Pak asserts that after his disability, his practice group moved him to primarily  
9 outpatient procedures that are “shorter, simpler, and require less skill,” meaning that he now  
10 performs a higher volume of cases than he did pre-disability, when he worked inpatient cases that  
11 were longer and more complex. *See id.* at 12:22-27 (citing in part Pak Decl. ¶ 16; Kamali Depo. at  
12 60:21-61:14; Bourhis Decl., Ex. S). Due to that higher case turnover, he says, the ASA/CPT  
13 codes “show higher base units and billed charges.” *Id.* at 12:27-28.

14 Finally, Pak proffers additional evidence—his declaration and deposition—stating that  
15 after his disability, he no longer works night or weekend on-call shifts, and only performs daytime  
16 on-call duties when another general anesthesiologist is on standby to support him in case he  
17 suffers a headache. *Id.* at 11:23-12:9 (citing in part Pak Decl. ¶ 16). He also no longer works  
18 obstetrics cases. *See id.* (citing in part Bourhis Decl., Ex. Y (“Pak Depo.”) at 416:15-417:2).  
19 According to Pak, before his disability he worked these on-call shifts on his own, and on obstetrics  
20 cases. *See* Pak Decl. ¶ 16.

21 Pak has met his burden on summary judgment, showing that there is a genuine dispute of  
22 material fact over whether he is able to perform the substantial and material duties of a general  
23 anesthesiologist. He has submitted affirmative evidence from which a jury could return a verdict  
24 in his favor, including his own testimony about his pre-disability work and current caseload. He  
25 also offered evidence attacking the credibility of Guardian’s analysis of the ASA/CPT codes—the  
26 primary evidence it relies upon in arguing that Pak still performs a general anesthesiologist’s  
27 substantial and material duties. Similarly, Guardian challenges some of Pak’s evidence—namely,  
28 his own declaration, which it describes as “conclusory” and “self-serving.” *See* Reply [Dkt. No.

1 57] 4:8. But the jury will have to weigh the evidence submitted by both sides and determine the  
2 credibility of that evidence. The question of whether Pak is able to perform the substantial and  
3 material duties of a general anesthesiologist cannot be answered as a matter of law.

4 This finding is further supported when considering the rest of the definition of “totally  
5 disabled” under California law. At the least, Pak has proffered evidence showing that he cannot  
6 perform the substantial and material duties of a general anesthesiologist in the usual or customary  
7 manner. Pak returns to his deposition and declaration, where he testified that he now primarily  
8 performs less complex outpatient work, cannot practice on his own, only works part-time (and  
9 without night or weekend on-call shifts), and no longer takes obstetrics cases. *See Oppo.* at 14:6-  
10 21 (citing in part Pak Decl. ¶ 16). In addition, Pak cites testimony from his boss, who stated that  
11 Pak “basically functions as a glorified nurse.” *Id.* at 14:22-26 (citing in part Kamali Depo. at  
12 91:14-92:15). Kamali also testified that his practice tries to ensure that Pak is “doing kind of the  
13 light work, so to speak” and performing “easy cases.” Kamali Depo. at 58:4-9, 60:25-61:11.

14 Similarly, Pak offers evidence showing that he cannot perform the substantial and material  
15 duties of a general anesthesiologist with reasonable continuity. *See Oppo.* at 15:3-10. That  
16 evidence again includes his declaration, where he stated that “[g]iven the unpredictable nature of  
17 [his] attacks,” his work schedule is “sporadic,” and he frequently rearranges it and asks colleagues  
18 to cover for him. Pak Decl. ¶ 16. It also includes additional testimony from Kamali, who stated in  
19 his deposition that Pak “takes a lot of time off because he has got to get medical treatments and  
20 when his migraines flare up, he can’t work.” Kamali Depo. at 74:8-15.

21 Guardian does not squarely address either point in its motion or reply. *See generally* MSJ;  
22 *see also* Reply. At most, it challenges Pak’s statement that he cannot work in the usual and  
23 customary way because another anesthesiologist must be on standby. Reply at 5:11-18.  
24 According to Guardian, Pak never raised this during its review of his claim, his physicians did not  
25 recommend having another anesthesiologist on standby, and he testified that he only needed a  
26 standby anesthesiologist for pediatric cases. *See id.* Such arguments require the weighing of  
27 evidence and determinations of credibility—a job for the jury, not the judge.

28 Taking all of this into account, Pak has shown that a genuine dispute of material fact exists

1 as to whether he is able to perform the substantial and material duties of a general anesthesiologist  
2 in the usual or customary manner with reasonable continuity. Therefore, there is a genuine dispute  
3 of material fact over whether Pak was totally disabled. Summary judgment is inappropriate on the  
4 breach of contract claim.

## 5 **2. Pediatric Anesthesia**

6 Next, Guardian contends that Pak continues to practice pediatric anesthesiology and thus,  
7 is not totally disabled. MSJ at 16:17-17:8. Its argument boils down to two primary points: first,  
8 that Pak is not “completely incapable” of anesthetizing children aged 12 and under (as he has  
9 asserted), and second, even if he were, because he still anesthetizes patients aged 13 to 18, he still  
10 performs pediatric anesthesiology. *See id.* at 17:5-8.

11 Regarding the first set of patients, Guardian argues that when Pak withdrew his staff  
12 privileges to treat patients aged 12 and under, he did so voluntarily—not because his treating  
13 physicians advised him to. *Id.* at 17:17-18:2. Rather, Guardian contends, one physician (Dr.  
14 Sachdev) recommended only that Pak reduce his work hours and improve his sleep by limiting  
15 night on-call shifts, and said that he would defer to Pak’s judgment about performing pediatric  
16 anesthesia. *See* MSJ at 17:19-22 (citing in part Collins Decl., Ex. 18 (“Pak Depo.”) at 193:12-  
17 195:7, 211:17-213:13). According to Guardian, another physician (Dr. Harjasleen Walia) opined  
18 that Pak should not “engage in his duties as an anesthesiologist when he is experiencing cluster  
19 headaches,” but did not otherwise restrict his work. *See id.* at 17:22-25 (citing in part Pak Depo.  
20 at 293:12-17).

21 Guardian further contends that there is no medical evidence supporting Pak’s assertion that  
22 he cannot safely administer anesthesia to patients aged 12 and under but can safely do so to those  
23 aged 13 and older. *Id.* at 18:3-6. In support, it points in part to testimony from Pak and Kamali  
24 that a patient’s age is not a bright-line determinative but that anesthesiologists also consider  
25 whether an older patient (i.e., one older than 12) has any comorbidities that warrant classifying her  
26 as a pediatric patient instead. *See id.* at 18:6-28; Pak Depo. at 167:15-168:20, 224:19-226:5  
27 (“[W]e can’t always go by chronological age. . . . The hospital says 12 years and under; however,  
28 it doesn’t always apply in actual practice. Because as we mentioned, people could be

1 physiologically underdeveloped or they could be overdeveloped, given a certain chronological  
2 age.”); Collins Decl., Ex. 20 (“Kamali Depo.”) at 53:8-54:10 (“The age is not the sole  
3 determinant.”).

4 Even if Pak were unable to administer anesthesia on patients aged 12 and under, Guardian  
5 argues that because he did not withdraw his privileges for children aged 13 to 18 and continues to  
6 treat patients within that age range, he is still practicing pediatric anesthesiology. MSJ at 16:18-24  
7 (citing Kelly Decl., Ex. 14) (showing units charged post-disability for patients over the age of 12).  
8 In support, it cites evidence including its medical expert’s report, Pak’s claimant statement, and  
9 Pak’s deposition testimony, all of which state that pediatric patients are those under the age of 18.  
10 *See id.* at 16:24-17:5; Novak Decl., Ex. 24 at 8 (“If Dr. Pak is still anesthetizing patients from age  
11 13-18, he is continuing to practice pediatric anesthesiology.”); Kelly Decl., Ex. 2 (“Pediatric  
12 Anesthesia: Treating children under the age of 18”); Pak Depo. at 52:22-23 (“Pediatric patients go  
13 to the age of 18”).

14 Pak responds that he is totally disabled from practicing pediatric anesthesiology because,  
15 in addition to no longer treating patients aged 12 and under, he is no longer treating those aged 13  
16 to 18 who are classified as pediatric. Oppo. at 8:8-26. He too submits evidence—his and  
17 Kamali’s depositions—that a patient between the ages of 13 and 18 may still be classified as  
18 pediatric depending on factors such as comorbidities, physical size, and mental development. *See*  
19 *id.* (citing Kamali Depo. at 49:5-16, 51:2-19, 53:8-54:10; Pak Depo. at 167:15-168:20, 229:6-21).  
20 According to Pak, he no longer treats such patients. Pak Decl. ¶ 11. Therefore, he argues, “he no  
21 longer practices any pediatric anesthesia.” Oppo. at 8:25-26.

22 Importantly, Pak also proffers evidence—letters from his current and former employers,  
23 his own testimony, and Kamali’s deposition—stating that he is no longer able to anesthetize  
24 pediatric patients because of his headaches and the skill level involved in pediatric anesthesiology.  
25 *See id.* at 7:12-22 (citing in part Bourhis Decl., Exs. C, D; Kamali Depo. at 50:4-16; Pak Decl. ¶¶  
26 11-14). In addition, he points to a letter from Dr. Sachdev, who restricted Pak from interrupted  
27 sleep and “stressful situations requiring increased concentration,” and wrote that “[l]imiting hours  
28 of work according to Dr. Pak’s comfort level would be best to prevent worsening of his condition

1 and remain efficacious in his work environment.” *See id.* at 9:1-14 (citing in part Bourhis Decl.,  
2 Ex I). Another letter from Dr. Walia described how cluster headaches “may inhibit Dr. Pak’s  
3 clinical judgment” and that “during an attack he may be unable to perform clinic duties, such as  
4 writing an order but certainly would be unable to intubate a patient.” *See id.* at 9:24-10:10 (citing  
5 Bourhis Decl., Ex. U).

6 Taken together, Pak contends, this evidence shows that he is unable to perform the  
7 substantial and material duties of pediatric anesthesiology. *See Oppo.* at 11:4-5. And because he  
8 cannot perform pediatric anesthesiology at all, he argues, he cannot do so in the usual and  
9 customary manner or with reasonable continuity. *See id.* at 11:6-19.

10 The evidence Pak submits regarding his ability to practice pediatric anesthesiology is less  
11 convincing than that for his ability to practice general anesthesiology. But it is not the court’s role  
12 to weigh evidence on summary judgment. Instead, I must look to the record to see if Pak has  
13 shown a genuine dispute of material fact from which a jury could decide in his favor.

14 Pak has shown a genuine dispute of material fact over his ability to practice the substantial  
15 and material duties of pediatric anesthesiology—and thus, a dispute of material fact over whether  
16 he is totally disabled. Pak and his employers have stated that he is no longer able to safely  
17 anesthetize pediatric patients, given the complexity of such cases and skill level required. His  
18 doctors advised certain restrictions to his work that, at the least, indicate that he is not able to work  
19 in the usual and customary manner with reasonable continuity. And Pak contends that he no  
20 longer treats pediatric patients of any kind, including those over the age of 12 classified as such  
21 because of other factors. The differing definitions of what constitutes “pediatric anesthesiology,”  
22 like the other evidence presented, are for a jury to consider.

23 Summary judgment on the breach of contract claim is DENIED.

24 **II. BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**

25 “The law implies in every contract, including insurance policies, a covenant of good faith  
26 and fair dealing.” *Wilson v. 21st Century Ins. Co.*, 42 Cal. 4th 713, 720 (2007). This does not  
27 obligate an insurance company to pay every claim an insured makes. *Id.* Rather, “an insurer’s  
28 denial of or delay in paying benefits gives rise to tort damages only if the insured shows the denial

1 or delay was unreasonable.” *Id.* at 723.

2 Under California law, the general rule is that “an insurer denying or delaying the payment  
3 of policy benefits due to the existence of a genuine dispute with its insured as to the existence of  
4 coverage liability or the amount of the insured’s coverage claim is not liable in bad faith even  
5 though it might be liable for breach of contract.” *See id.* (citation omitted). A legitimate dispute  
6 over whether facts trigger the insurance coverage is one example of such a dispute. *See id.* But  
7 the genuine dispute rule is not absolute. It “does not relieve an insurer from its obligation to  
8 thoroughly and fairly investigate, process, and evaluate the insured’s claim.” *Id.* “A genuine  
9 dispute exists only where the insurer’s position is maintained in good faith and on reasonable  
10 grounds.” *Id.* (emphasis in original).

11 There is a legitimate dispute over whether the facts show that Pak was totally, rather than  
12 residually, disabled. To avoid summary judgment on his good faith claim, Pak must therefore  
13 show a genuine dispute of material fact over whether Guardian’s investigation was unreasonable,  
14 unfair, or not thorough.

15 Pak argues that Guardian acted unreasonably in a number of ways, including by: ignoring  
16 the opinions of his treating physicians and employers; mispresenting his physicians’ opinions;  
17 improperly focusing on flawed ASA/CPT codes; and delaying its decision on Pak’s claim. *See*  
18 Oppo. at 19:7-29, 21:12-22:3.

19 Pak attempts to manufacture a genuine dispute of material fact about the investigation’s  
20 sufficiency where none exists. Indeed, much of the evidence he cites undercuts his argument. For  
21 example: he accuses Guardian of ignoring the opinions of his physicians and employers, who he  
22 asserts “unequivocally support his total disability claim.” *Id.* at 18:26-28. But the two letters from  
23 his employers state only that Pak was no longer practicing pediatric anesthesiology—not that he  
24 was no longer practicing general anesthesiology. *See id.*, Bourhis Decl., Exs. C, D. Not only does  
25 Pak mispresent the content of the letters, he submits no evidence that they were in fact ignored.<sup>2</sup>

26 \_\_\_\_\_  
27 <sup>2</sup> Pak points to the deposition of Guardian’s claim representative, who testified that he “made no  
28 mention” of the statements of Pak’s employers in explaining Guardian’s decision on Pak’s claim.  
*See Oppo.* at 18:28-19:6 (citing Bourhis Decl., Ex. Z at 37:1-38:2, 151:17-154:2, 290:4-16). But  
this does not prove that Guardian *ignored* those letters in investigating Pak’s claim. Moreover,

1       Moreover, several pieces of evidence confirm that Guardian in fact reviewed the opinions  
2 of his treating physicians, Drs. Sachdev and Walia. A November 10, 2020, letter from Guardian  
3 to Pak’s attorney stated that a consulting physician had reviewed Walia’s report. *See id.*, Ex. V.  
4 Similarly, Guardian stated in a July 2, 2020, letter to counsel that a consulting physician had  
5 spoken with Sachdev on the phone.<sup>3</sup> *See id.*, Ex. R. Additional evidence proffered by Guardian  
6 shows that it reviewed several progress notes that Sachdev submitted over the course of  
7 Guardian’s investigation of Pak’s claim. *See* MSJ, Kelly Decl., Ex. 10. It can hardly be said that  
8 Guardian ignored the opinions of Pak’s treating physicians when the record explicitly references  
9 those opinions multiple times.

10       Nor did Guardian misrepresent those physicians’ opinions. Pak contends that Guardian  
11 falsely stated in its denial letter that Sachdev “provided no medical restriction or limitation that  
12 would preclude Dr. Pak from the practice of pediatric anesthesia” when in fact he “provided  
13 several restrictions and limitations” that preclude both pediatric and general anesthesia. Oppo. at  
14 19:7-16 (citing in part Bourhis Decl., Ex. R). Again, Pak overstates the evidence. Guardian  
15 acknowledged that Sachdev “was supportive that Dr. Pak’s impairment would restrict and limit his  
16 ability to work long hours or take night call.” *See* Bourhis Decl., Ex. R. But nothing in Sachdev’s  
17 initial letter to Guardian (which Pak referenced in response to Guardian’s denial of his claim)  
18 specifically stated that he was unable to practice pediatric anesthesiology. *See id.*, Exs. I, S.  
19 Rather, he suggested that Pak limit his hours of work. *See id.*, Ex. I. Moreover, Guardian told Pak  
20 that a consulting physician spoke with Sachdev, reviewed Pak’s medical records, and determined  
21 that although he had a “reduced ability to work,” there was nothing “which would specifically

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22  
23 given the volume of materials that Guardian had in reviewing Pak’s claim, it is not unreasonable  
24 that Guardian did not cite two, one-page letters in its decision letter.

25       <sup>3</sup> This same evidence counters Pak’s argument that Guardian did not thoroughly investigate his  
26 claim because it “failed to conduct an independent medical evaluation” of him. *See* Oppo. at 22:4-  
27 9. Pak ignores the second half of the quote he cites in support, which states that an insured does  
28 not thoroughly investigate a claim “if it fails to have the insured examined by a doctor of its choice  
*or at least to consult with the insured’s treating physician.*” *See id.* (citing *Wilson v. 21st Century  
Ins. Co.*, 38 Cal. Rptr. 3d 514, 518 (2006)). In any case, the California Supreme Court later  
clarified that “stating a general rule as to how much or what type of investigation is needed . . . is  
difficult,” and that instead, an insurer’s “good or bad faith must be evaluated in light of the totality  
of the circumstances surrounding its actions.” *Wilson*, 42 Cal. 4th at 723.

1 preclude the practice of the subspecialty of pediatric anesthesia.” *See id.*, Ex. R.

2 The same is true for Walia’s letter to Guardian. She did not, as Pak asserts, restrict Pak  
3 from practicing pediatric anesthesiology. *See id.* at 19:17-21 (citing Bourhis Decl., Exs. U, V).  
4 Instead, she stated that she “would not recommend Dr. Pak engage in his duties as an  
5 anesthesiologist *when he is experiencing cluster headaches.*” *See id.*, Ex. U (emphasis added).  
6 Pak may disagree with Guardian’s assessment of his physicians’ statements, but that does not  
7 mean that Guardian misrepresented what they said.

8 Finally, the evidence does not show that Guardian improperly relied on the ASA/CPT  
9 codes. *See Oppo.* at 21:24-22:3. The record indicates a lengthy, thorough investigation by  
10 Guardian into matters that remain in dispute. It repeatedly requested—and reviewed—additional  
11 information from Pak. *See, e.g.*, MSJ, Kelly Decl., Ex. 4 (requesting additional financial records  
12 and a list of procedures Pak was no longer performing, among other information); Oppo., Bourhis  
13 Decl., Ex. K (acknowledging receipt of pay stubs and asking for profit and loss statements). It  
14 consulted his doctors and reviewed their reports, including updated progress reports. *See MSJ,*  
15 Kelly Decl., Ex. 10. It looked at his financial statements. *See Oppo.*, Bourhis Decl., Ex. R. The  
16 ASA/CPT codes were but one part of this investigation, which Guardian attests resulted in a  
17 review of over 2,000 pages of documents. *See Reply* at 13:17. The nature of the investigation—  
18 including the parties’ disagreement over Pak’s occupation (which remained in dispute until the  
19 litigation of this motion)—shows that any delay in rendering a decision by Guardian was  
20 reasonable, as does evidence showing that Pak delayed providing certain records that Guardian  
21 needed to make its decision. *See MSJ*, Kelly Decl., Ex. 9.

22 Pak may disagree with Guardian’s conclusion. But that disagreement does not mean that  
23 Guardian’s investigation was so insufficient that it breached the covenant of good faith and fair  
24 dealing. There is no genuine dispute of material fact here; the evidence presented—including that  
25 by Pak—shows that Guardian’s investigation was reasonable, fair, and thorough.

26 Guardian’s motion for summary judgment is therefore GRANTED on the good faith and  
27 fair dealing claim.

**III. PUNITIVE DAMAGES**

Because only the breach of contract claim remains, Pak cannot recover punitive damages as a matter of law. *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1571 (2022) (“punitive damages are generally not available for breach of contract”); *In re Late Fee & Over-Limit Fee Litig.*, 741 F.3d 1022, 1026 (9th Cir. 2014) (“punitive damages are generally not recoverable for breach of contract unless the conduct constituting the breach is also a tort”). And it is worth adding that Pak has proffered no evidence showing that Guardian engaged in “oppression, fraud, or malice” as required to recover punitive damages. See Cal. Civ. Code § 3924(a). He contends that Guardian “avoided paying the benefits owed in a despicable manner,” knowing that he was “in financial duress, that he suffered from a condition people often commit suicide over, and that its claim denial forced him to continue working in the medical field during a dangerous pandemic.” Oppo. at 24:12-24. In support, he cites a letter that he wrote to Guardian. See *id.*, Bourhis Decl., Ex. O. This does not create a genuine dispute of fact over any oppression, fraud, or malice by Guardian. Instead, the record shows that Guardian conducted a thorough, reasonable investigation into Pak’s claim.

Therefore, summary judgment is GRANTED on the punitive damages claim.

**CONCLUSION**

Guardian’s motion for summary judgment is DENIED with respect to the breach of contract claim and is otherwise GRANTED.

**IT IS SO ORDERED.**

Dated: August 19, 2022



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William H. Orrick  
United States District Judge